85-445

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PETER DEFAZIO, ET AL, PETITIONERS,

V.

THE CITY OF SPRINGFIELD BY AND THROUGH THE SPRINGFIELD UTILITY BOARD, ET AL,

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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13pp

QUESTIONS PRESENTED

1. Whether a case or controversy within the meaning of Article III of the United States Constitution was before the Court when the record did not contain all the contractual documents upon which the declaration of rights was requested?

2. Whether declaratory relief can be granted upon a contract that is incomplete by its own terms?

3. Whether the court has the power to deny discovery of documents relevant to petitioners theory of the case?

LIST OF PARTIES

The parties to the proceedings in the court where judgment is sought to be reviewed are:

1. Petitioners and Intervening Defendants: Peter DeFazio, Glen Sofge, George Edward Obrian, Emmitt Meeks, Shirley Meeks,

Paul Stewart, Frederick V. Simmons and John Montgomery and Peter Powers;

2. Plaintiff, City of Springfield;

3. Defendants: Washington Public Power Supply System, Eugene Water and Electric Board, Bonneville Power Administration, Washington Utilities Group (Public Utility District No. 1 of Benton County, Washington; Public Utility District No. 1 of Chelan County, Washington; Public Utility District No. 1 of Clallam County, Washington; Public Utility District No. 1 of Clark County, Washington; Public Utility District No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Douglas County, Washington; City of Ellensburg, Washington; Public Utility District No. 2 of Grant County, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Public Utility District of Klickitat County, Washington; Public Utility District No. 1 of Mason County, Washington; City of Seattle, Washington; Public Utility

District No. 1 of Okanogan County, Washington; Public Utility District No. 2 of Pacific County, Washington; Public Utility District No. 1 of Skamania County, Washington; City of Tacoma, Washington), Portland General Electric Co., Pacific Power and Light Co., Columbia Rural Electric Association, Inc.; the 17 defendants (City of Burley, City of Centralia, Clearwater Power Company, Elmhurst Mutual Power & Light, Glacier Electric Cooperative, City of Heyburn, Idaho County Light & Power, Town of McCleary, Northern Lights, Inc., Ohop Mutual Light, Okanogan County Electric Cooperative, City of Port Angeles, Prairie tower Cooperative, City of Rupert, Rural Electric Cooperative, Unity Light & Power, Wells Rural Electric Company), Lewis County Public Utility District 1, Mason County Public Utilities District 3, the City of Seattle, Central Lincoln Peoples' Utility District, Claskinie Peoples' Utility District, Tillamook Peoples' Utility District, Northern Wasco

Peoples' Utility District, and Surprise Valley Electrification Corporation.

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THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

PETER DEFAZIO, ET AL., PETITIONERS,

V. THE CITY OF SPRINGFIELD, BY AND THROUGH THE CITY OF SPRINGFIELD, ET AL.,

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT L. ACKERMAN, Ackerman, DeWenter & Huntsberger, P.C., on behalf of Peter DeFazio, et al, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals of the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 752 F2d 1423. The opinions of the District Court are reported at 564 F. Supp. 86 (pre-trial motions) and 564 F. Supp.

90 (on the merits).

JURISDICTION

The judgment of the Court of Appeals (App. A, Infra 1A) was entered on May 31, 1985. A petition for rehearing was denied on May 16, 1985 (App. B, Infra, 1B - 2B). The jurisdiction of this court is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2 of the United States Constitution provides in relevant part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . to Controversies to which the United States shall be a party; - to Controversies between two or more states; - between a State and citizen of another State; - between Citizens of different States; . . ."

2. 28 USC 2201 provides:

> "In a case of actual controversy within its jurisdiction . . ., any court of the United States, upon the filing of an appropriate

> pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

STATEMENT OF FACTS

1. The City of Springfield, acting by and behalf of its local utility board, filed a claim for declaratory relief alleging that "uncertainty and controversy" existed over the authority of Oregon public utilities to enter into contracts, referred to as "net billing agreements" executed by the Bonneville Power Administration (BPA), the Washington Public Power Supply System (Supply System), and over 100 public and cooperative utilities throughout the Pacific Northwest.

2. Plaintiff joined all signatories to those agreements as defendants.

These contracts involve the financing and construction of three nuclear power plants located in the state of Washington. These

projects are referred to as Projects 1, 2 and 3 of the Supply System.

3. The BPA filed crossclaims and counterclaims seeking a declaratory judgment that all parties to net billing agreements have authority to enter those agreements.

4. On February 14, 1983, the trial court established a trial management schedule. It did not provide for discovery (App. C, Infra., 1 C). The schedule also established the following:

(a) Motions for Intervention must be filed by March 21, 1983;

(b) Oral argument on objections to intervention were set for March 28, 1983;

(c) Motions for summary judgment must be filed by March 28, 1983;

(d) Oral arguments on summary judgment were set for April 22, 1983;

5. On March 15, 1983,the trial court

ruled in pre-trial motions that "Federal common law governs this case." 564 F. Supp. at 88.

6. Petitioners motion to intervene as ratepayers was allowed on March 29, 1983.

7. Petitioners moved the trial court to amend the trial management schedule to provide for discovery.

8. On March 29, 1983 the trial court denied petitioner's motion to amend the trial management schedule. (App. D, Infra, 1D).

9. Petitioners moved the court to continue the summary judgment proceedings and establish a discovery conference pursuant to Fed. R. Civ. P. 26(f) for the production of documents requested in the motion and that the parties admit or deny the truth and genuiness of such documents at the discovery conference. This motion was based upon the proposition that state law rather than "federal common law," applied to the capacity of the parties to enter into the net billing agreements. The

court previously ruled that federal common law controlled the case. 564 F. Supp. at 88.

10. The trial court completed the Summary Judgment proceedings and issued an opinion upholding the agreements on the basis of "federal common law" on April 27, 1983. 564 F. Supp at 93, 94. The judgment of the trial court was entered on May 16, 1983 and dismissed the other claims in the preceeding which included petitioner's Motion for a Continuance of the summary judgment proceedings (App E, Infra 4E).

11. Subsequently, the Washington and Idaho Supreme Courts held that the public utilities in those states lacked authority to enter into similar agreements (Participants Agreements) that involved the financing and construction of nuclear projects 4 and 5 of the Supply System. See Chemical Bank v. WPPSS, 99 Wash 2d 772, 666 P2d 329, (1983), (Chemical Bank I), and Asson v. City of Burley, 105 ID 432, 670 P2d 839 (1983).

The Supreme Court of Oregon upheld those agreements with respect to the Oregon public utilities, DeFazio v. WPPSS, 296 Or 550, 679 P2d 1316 (1984). The Washington Supreme Court released all participants from their obligations under the Participants Agreement, Chemical Bank v. WPPSS, 102 Wash 2d 874, 691 P2d 524 (1984). (Chemical Bank II).

12. The Court of Appeals for the Ninth Circuit found that the authority of the participants to enter the agreements was a question of state law. 752 F2d at 1428. The court, however, found that the agreements were power sales agreements which were valid under state law. Id at 1429.

13. The three net billings and the Participants Agreement contain common language regarding the payment of the bonded indebtedness of the Supply System that is used to construct the five nuclear plants. The Supply System shall use its "best efforts" to finance the construction of the nuclear plants

by the issuance of its bonds pursuant to a "Bond Resolution." Each of the agreements "...shall be subject to the terms and provisions of... the Bond Resolution." The Supply System bills each participant its share of construction costs that have been financed from bond proceeds. Each participant must pay the Supply System unconditionally, without set off and "whether or not" the projects or projects "are completed, operable or operating...".

14. The bond resolutions are specifically and expressly incorporated as part of the net billing agreements. They are not a part of the record in this case. The trial court denied discovery on that issue. The Court of Appeals held that discovery was "not relevant to the issues presented." 752 F2d at 1427.

15. The impact of the bond resolutions upon the agreements may characterize the net billing agreements as a device for the security of bonds rather than a power sales

agreement. Applying state law, the net billing agreements may be invalid as to Washington participants. See Chemical Bank v. WPPSS, (Chemical Bank I), supra., and Idaho participants, see Asson v City of Burley, supra. All the participants may have a claim to be released from the net billing agreements under state law, Chemical Bank v. WPPSS, (Chemical Bank II), supra.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the validity of certain net billing agreements which were used to finance three nuclear projects in the state of Washington. The Court of Appeals held that state law applies to determine whether public participants had the power to execute the contracts, however, that court concluded that the agreements were power sales agreements which were valid under state law. This conclusion rests upon the major premise that

all the evidence was before the court upon which a declaration could be made regarding the characterization of the net billing agreements.

This case involves substantial issues of jurisdiction and the discretionary power of the court to grant declaratory relief upon an incomplete factual record. The denial of discovery is contrary to precedent and substantially departs from the usual course of judicial proceedings and requires the exercise of supervision by this Court.

1. The Court of Appeals and the trial court failed to consider that Article III, Section 2 of the United States Constitution requires that a case or controversy must be presented before a judgment can be made under the Declaratory Judgments Act. The issue of justicability is jurisdictional and can be raised at any time, McGrath v. Kristensen, 340 US 162, 167, 71 S Ct 228, 95 Led 173, 179 (1950), although petitioners raised this issue

below (Appellant's Brief, p. 17). A justicable controversy under the Declaratory Judgments Act "manifestly has regard to the [Article III] constitutional provision and is operative only in respect to controversies which are such in the constitutional sense." Aetna Life Ins. Co. v. Haworth, 300 US 227, 240, 57, S Ct 463, 81 Led 617, 621 (1936). The controversy must lead to specific relief through "a decree conclusive in character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts." 300 US at 241.

In the present case, each of the net billing agreements were subject to the bond resolutions of the Supply System by their own terms. These documents were not before the court. They were essential to the characterization of the net billing agreements because they provide the mechanism under which the Supply System was obligated to use its best efforts under the net billing agreements to finance nuclear plants 1, 2 and

3. It was this financing aspect that invalidated the similarly worded Participants Agreements that involved Supply System projects numbers 4 and 5 under state law in Chemical Bank v. WPPSS, (Chemical Bank I), supra., and Asson v. City of Burley, supra., and provided the basis for the release of all participants to those agreements. Chemical Bank v. WPPSS, (Chemical Bank II), supra.

This incomplete record lead the trial and appellate court to a hypothetical finding that the net billing agreements were power sales agreements.

A controversy "must be definite and concrete," in order to meet the Article III standard. Aetna Life Ins. Co. v Haworth, 300 US at 240. The lack of an adequate factual record does not present a case in adversial terms and leads to hypothetical results. National Conference of Catholic Bishops v Smith, 653 F2d 535, 540 (DC Cir 1981).

Therefore, the trial and appellate courts granted declaratory relief on an incomplete record. Neither court had jurisdiction under Article III, Section 2 of the United States Constitution because all the documents which were incorporated within the net billing agreements were not before the court for adjudication.

2. The incomplete nature of the factual record has been previously discussed. The federal courts do not have a duty under the Declaratory Judgment Act to provide declaratory relief. The Act is an authorization, not a command. Declaratory adjudications should rest "on an adequate and full bodied record". Public Affairs Associates v. Rickover, 369 US 111, 113, 82 S Ct 580, 582, 7 Led 2d 604, 607 (1962). Declaratory relief cannot be based upon an unsatisfactory factual record. Id at 114.

3. The lack of an adequate record in this case is a direct result of the trial

court's denial cf discovery to petitioners.

The denial of discovery is contrary to the rule in the Ninth Circuit in Summary Judgment proceedings. In Portland Retail, etc. v. Kaiser Foundation, 662 F2d 641 (9th Cir 1981). The court held that a party against whom a summary judgment is filed, "must be afforded...an opportunity to respond." This requires that "sufficient time be afforded for discovery necessary to develop facts essential to justify [a party's] opposition to the motion..." (Case citations ommitted) Id at 645. In Portland Retail the defendant's motion for summary judgment was filed on the day discovery was concluded by the pre-trial order. The Summary Judgment proceedings increased the scope of the proceeding. There was no opportunity for discovery. In the present case petitioners were allowed to intervene the day after motions for Summary Judgments were to be filed. (App. C, Infra 2C). Petitioners

timely motions to amend the trial management schedule and postpone the Summary Judgment proceedings were denied.

The denial of discovery was unprecedented and is contrary to the philosophy of the Federal Rules of Civil Procedure. FRCP 1 provides that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action." The pre-trial deposition and discovery mechanisms are recognized as "one of the most significant innovations of the Federal Rules of Civil Procedure." The objective of the discovery rules is "to obtain the fullest possible knowledge of the issues and facts before trial." The discovery rules are "to be accorded a broad and liberal treatment" in order to provide knowledge of all relevant facts essential to proper litigation." Hickman v. Taylor, 329 US 495, 500, 501, 507, 67 S Ct 385, 389, 392, 91 Led 451, 457, 460 (1947).

The denial of discovery departs substantially from the usual course of judicial proceedings and requires the supervisory powers of this court. The court's trial management schedule (App. C, Infra 2C) did not provide for discovery. Petitioners moved the court to amend the trial management schedule to provide discovery. Petitioners moved to continue the summary judgment proceedings in order to provide discovery of documents which included the bond resolutions that were incorporated within the net billing agreements. Petitioners suggested that the trial court convene a discovery conference pursuant to Fed.R.Cir.P. 26(f) at which time the truth and genuineness of the requested documents could be admitted or denied in order to expedite the discovery process. At this time the trial court, in pre-trial motions, ruled that "Federal common law governs this case" 564 F. Supp. at 88. Petitioners' request for discovery was based upon the

application of state law on the capacity of the parties to execute the net billing agreements. Petitioners' motions were denied. That issue was certainly relevant especially when the Court of Appeals found that state law, rather than federal common law, applied to the capacity of the parties to contract, 752 F2d at 1428. The Court of Appeals compounded the error when it found that such a request for discovery was "not relevant to the issues presented for summary judgment." Id at 1427.

CONCLUSION

Petitioners have been denied their right to discovery which lead to an incomplete record, jurisdictional error, and a substantial departure from the usual course of judicial proceedings. The court below departed from the decisions of this court on the first two questions presented and its own precedent on the third question presented. The

petitioners' writ of certiorari should be issued.

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CERTIFICATE OF MAILING

I hereby certify that the foregoing Petition for Writ of Certiorari was served this 13 day of September, 1985 by United States mail, by depositing three true copies of said petition with postage prepaid thereon in the United States Post Office in Springfield, Oregon addressed to each of the following parties:

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 83-3927
No. 83-4024
DC #. CV 82-1387-RE

THE CITY OF SPRINGFIELD, a municipal corporation, acting by and through the Springfield Utility Board,

Plaintiff-Appellee,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation, et al,

Defendants-Appellees,

v.

MASON COUNTY PUBLIC UTILITY DISTRICT NO. 3 and LEWIS COUNTY PUBLIC UTILITY DISTRICT NO. 1.,

Intervening Defendants-Appellants.

JUDGMENT

APPEAL from the United States District Court for the Portland District of Oregon

THIS CAUSE came on to be heard on the Transcript of the Record from the United

States District Court for the Portland District of Oregon and was duly submittted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed: May 31, 1985, 9:08 a.m.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 83-3927
No. 83-4024
DC No. CV 82-1387 RE
Oregon (Portland)

THE CITY OF SPRINGFIELD, etc.,

Plaintiff-Appellee,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, etc,; CITY OF EUGENE; BONNEVILLE POWER ADMINISTRATION, etc., PETER JOHNSON, etc., et al.,

Defendants-Appellees,

v.

PETER DeFAZIO, et al,

Intervening Defendants-Appellants.

ORDER

Before: KENNEDY and FERGUSON, Circuit Judges, and WILLIAMS, * District Judge.

The panel as constituted in the above case has voted unanimously to deny the

petition for rehearing. Judges Kennedy and Ferguson voted to reject the suggestion for a rehearing en banc and Judge Williams recommended the denial of the en banc request.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Hon. David W. Williams, Senior United States District Judge for the Central District of California, sitting by designation.

Filed, May 10, 1985, Phillip B. Winberry, Clerk, U.S. Court of Appeals

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

CIVIL MINUTES-GENERAL

Case No. 82-1387-RE

Date: February 14, 1983

Title: CITY OF SPRINGFIELD v. W.P.P.S.S.

Docket Entry

Record of status conference:

Order setting the following schedule:

see below

Present:

Hon. JAMES A. REDDEN, JUDGE

M. Hartzell, Deputy Clerk

J. Harris, Court Reporter

Attorneys Present for Plaintiffs:

Peter Mersereau

Attorneys Present for Defendants:

(List attached)

PROCEEDINGS:

2/18 cutoff for filing limited answers or motions to dismiss

2/18 responses due

3/7 replys due

3/14 10:30 AM Oral Argument on motions to dismiss. BRIEFS ON MOTIONS TO DISMISS LIMITED TO 10 PAGES

3/21 Motions to Intervene to be filed

3/25 objections to be filed

3/28 9:30 AM Oral Argument

3/28 Motions for Summary Judgment

4/7 responses due

4/14 replys due

4/22 9:30 Oral Argument

APPENDIX D

CIVIL MINUTES-GENERAL

Case No. 82-1387-RE

Date: March 29, 1983

Title: CITY OF SPRINGFIELD v. W.P.P.S.S.

Present: Hon. JAMES A. REDDEN, JUDGE

M. Hartzell, Deputy Clerk

DOCKET ENTRY

The motion for intervention by Springfield ratepayers is GRANTED. The answer, counterclaim, and cross-claim of intervenors shall be deemed filed as of March 28, 1983. Other parties shall have until April 4, 1983 to plead to the counterclaim and cross-claim.

Motions for summary judgment were due yesterday, March 28, 1983. Responses to those motions are due April 7. 1983. Intervenors may raise their arguments either by way of response to the pending summary judgment motions on April 7, or by way of cross motions

filed on that date. Replies or responses to those briefs will be due April 14. Intervenors shall have right of final reply on April 18, 1983. Argument shall remain scheduled for April 22, 1983 at 9:30.

Intervenor's motion to delay proceedings is DENIED. If intervenors contend that there are issue of fact which preclude summary judgment, they shall assert such an argument in their filings, stating with specificity the facts outstanding and the nature of the discovery required for their resolution. If the court concludes that there are such issues, a time for discovery will be set.

The motions of Puget Sound and Washington Water Power to enlarge time and to dismiss will be decided without argument on April 12, 1983. Responses to those motions will be due April 8, 1983 and reply, if any, shall be due April 11, 1983.

Plaintiff's motion to dismiss the

cross-claims of Alder Mutual, Parkland and Douglas County is GRANTED, and these claims are dismissed without prejudice.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Civil No. 82-1387-RE

THE CITY OF SPRINGFIELD, a municipal corporation, acting by and through the Springfield Utility Board,

Plaintiff

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation; CITY OF EUGENE, BONNEVILLE POWER ADMINISTRATION, an agency of the United States Government; PETER JOHNSON, Administrator of the Bonneville Power Administration, et al.,

Defendants.

JUDGMENT

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REDDEN, Judge:

This matter came before the Court for consideration of the Motions for Summary Judgment filed by the City of Springfield, the Bonneville Power Administration (BPA) and Peter Johnson, BPA Administrator, the Washington Public Power Supply System (WPPSS), and Pacific Power and Light Company, the response thereto, the Motions to Dismiss or to stay on justiciability or abstention grounds, and the responses filed thereto. The Court having heard oral argument, having considered the entire record herein, and having rendered in writing its Opinion and Order on April 27, 1983,

Based upon the Court's Opinion and Order, IT IS HEREBY ORDERED AND ADJUDGED:

1. That all signatories to the net billing agreements pertaining to the construction of WPPSS plants 1, 2 and 3 and the Trojan Nuclear Plant had lawful authority

to enter into those agreements;

2. That the Motions for Summary Judgment be and hereby are granted to the extent consistent with this Court's Opinion and Order of April 27, 1983;

3. That the Motions to dismiss or to stay based upon the issues of justiciability or abstention be and hereby are denied; and

4. That any and all other claims raised in this litigation, to the extent not embodied in the Court's Opinion and Order of April 27, 1983, be and hereby are dismissed without prejudice.

DATED this 16 day of May, 1983.

James A. Redden
United States District Judge

Filed May, 16, 1983, Robert M. Christ, Clerk